(2)

No. 05-817

In the Supreme Court of the United States

GLEN GUADALUPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

WAN J. KIM
Assistant Attorney General

DENNIS J. DIMSEY
CONOR B. DUGAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Petitioner was convicted of corruptly persuading another person, or attempting to do so, with the intent to hinder, delay, or prevent her communication to a federal law enforcement officer of information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. 1512(b)(3). The questions presented are as follows:

1. Whether the government presented sufficient evidence that petitioner believed that the person he persuaded (or attempted to persuade) might communicate with federal authorities.

2. Whether the district court committed reversible plain error in instructing the jury concerning the elements of the offense.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Arthur Andersen LLP v. *United States*, 125 S. Ct. 2129 (2005) 9, 10, 12, 13

United States v. *Applewhaite*, 195 F.3d 679 (3d Cir. 1999) 4

United States v. *Baldyga*, 233 F.3d 674 (1st Cir. 2000), cert. denied, 534 U.S. 871 (2001) 10

United States v. *Bell*, 113 F.3d 1345 (3d Cir.), cert. denied, 522 U.S. 984 (1997) 8

United States v. *Byrne*, 435 F.3d 16 (1st Cir. 2006) 7, 10, 11

United States v. *Causey*, 185 F.3d 407 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000) 7, 8

United States v. *Diaz*, 176 F.3d 52 (2d Cir.), cert. denied, 528 U.S. 875 and 957 (1999) 7

United States v. *Emery*, 186 F.3d 921 (8th Cir. 1999), cert. denied, 528 U.S. 1130 (2000) 7

United States v. *Olano*, 507 U.S. 725 (1993) 11

United States v. *Perry*, 335 F.3d 316 (4th Cir. 2003), cert. denied, 540 U.S. 1185 (2004) 7

United States v. *Serrata*, 425 F.3d 886 (10th Cir. 2005) 7

Cases—Continued: Page

United States v. *Stansfield*, 101 F.3d 909 (3d Cir. 1996) 4
United States v. *Veal*, 153 F.3d 1233 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999) 7
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9

Statutes:

18 U.S.C. 242 4
18 U.S.C. 1512(a)(1)(C) 8
18 U.S.C. 1512(b)(2)(A) 10
18 U.S.C. 1512(b)(2)(B) 10
18 U.S.C. 1512(b)(3) ..... *passim*
18 U.S.C. 1512(g)(2) (Supp. II 2002) 7, 10

In the Supreme Court of the United States

No. 05-817

GLEN GUADALUPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 402 F.3d 409.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2005. A petition for rehearing was denied on July 19, 2005 (Pet. App. 21a-22a). On October 14, 2005, Justice Souter extended the time for filing a petition for a writ of certiorari to and including December 1, 2005. On November 28, 2005, Justice Souter further extended the time for filing to and including December 16, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of corruptly persuading another person, or attempting to do so, with the intent to hinder, delay, or prevent her communication to a federal law enforcement officer of information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. 1512(b)(3). He was sentenced to 15 months of imprisonment, to be followed by two years of supervised release. Pet. App. 16a-20a. The court of appeals affirmed. *Id.* at 1a-14a.

1. On March 11, 1999, Reginald Steptoe and Cornell Tyler, two correctional officers at the Curran Fromhold Correctional Facility in Philadelphia, savagely beat Dante Hunter, a prison inmate. Linda Burnette, a correctional lieutenant, observed the beating and ordered the officers to stop, but they refused to do so. A short time later, Burnette reported the beating to Winston Boston, the shift commander, and then to petitioner, the deputy warden. When Burnette talked to petitioner, he initially told her that someone was going to "burn" for what happened. When he learned of the identities of the officers involved, however, petitioner then told her that "they can't burn" because "they're my boys, my homies." Pet. App. 3a.

When Lieutenant Burnette later discussed the incident with petitioner and Captain Boston, petitioner said that he had informed the officers involved that "someone had to come up with an injury to justify the amount of force" used against the victim. Petitioner also instructed Burnette not to mention in her memorandum

on the incident that she had ordered the officers to stop. Pet. App. 4a.

Because Lieutenant Burnette felt intimidated and was afraid to "go against the grain," she lied in her initial memorandum and in other statements about the incident. Subsequently, however, she informed the warden of the prison that she had lied, and thereafter testified truthfully. Pet. App. 4a.

2. On July 26, 2001, a federal grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with two counts of corruptly persuading other persons, or attempting to do so, with the intent to hinder, delay, or prevent their communication to a federal law enforcement officer of information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. 1512(b)(3). The first count concerned petitioner's conduct toward Lieutenant Burnette, and the second his conduct toward Captain Boston. At the close of the evidence, the district court instructed the jury, without objection, that the government was required to prove, *inter alia*, that "the defendant attempted to corruptly persuade another person"; that "the defendant acted with the intent to prevent the communication to a [federal] law enforcement officer * * * of information relating to the commission of a federal offense"; and that "such information relates to the commission, or possible commission, of a federal offense." The trial court also instructed the jury that "[b]y its wording this statute does not depend on the existence or imminency of a federal case or investigation, but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime." The jury found petitioner guilty on the

first count, but not guilty on the second. Pet. App. 2a, 16a-20a; C.A. App. 2260, 2261; Gov't C.A. Br. 4-5.[1]

3. On appeal, petitioner contended (1) that the government had presented insufficient evidence that petitioner believed that Lieutenant Burnette might communicate with federal authorities and (2) that the district court had erred in instructing the jury on the elements of the offense. The court of appeals affirmed. Pet. App. 1a-14a.

a. With regard to petitioner's sufficiency-of-the-evidence claim, the court reasoned that, to obtain a conviction pursuant to 18 U.S.C. 1512(b)(3), the government was required to prove, *inter alia*, that the defendant believed that the person he persuaded (or attempted to persuade) might communicate with federal authorities. Pet. App. 5a. Citing its earlier decision in *United States* v. *Stansfield*, 101 F.3d 909 (3d Cir. 1996), the court explained that "[t]his * * * element may be inferred from the fact that the offense was federal in nature, plus 'additional appropriate evidence.'" Pet. App. 5a. The court added that "an example of this 'additional appropriate evidence' is that the defendant had actual knowledge of the federal nature of the offense." *Ibid.* And the court noted that, in its subsequent decision in *United States* v. *Applewhaite*, 195 F.3d 679 (3d Cir. 1999), it had held that the government need only prove that the defendant intended to influence an investigation that happened to be federal. Pet. App. 7a.

The court of appeals then concluded that the government had met its burden of proof either under the stan-

[1] Petitioner was tried together with the officers who had engaged in the beating. Those officers were both convicted of depriving another person of his civil rights, in violation of 18 U.S.C. 242. Gov't C.A. Br. 4-5.

dard of *Stansfield*, because "there is 'additional appropriate evidence' that [petitioner] knew or should have known that Burnette might communicate with federal officials based on his position and experience as a prison administrator," or under the standard of *Applewhaite*, because "[petitioner] intended to influence an investigation which later became federal." Pet. App. 9a. The court explained that "the evidence * * * supports an inference that [petitioner] believed that Burnette might communicate with federal authorities." *Ibid.* Noting that petitioner was an experienced prison administrator, the court reasoned that, "[b]ecause of his position and experience, [petitioner] had knowledge, or should have had knowledge, that the beating of an inmate in a penal institution may be considered a federal civil rights violation," *id.* at 10a, and "that federal officers were highly likely to be involved at some point in the investigation" (insofar as "federal authorities typically become involved" in investigations of similar incidents), *id.* at 11a & n.3. The court concluded that the jury could reasonably infer "that [petitioner] had actual knowledge of the federal nature of the offense or that Burnette's information might ultimately be communicated to officers who happen to be federal." *Id.* at 11a.

b. With regard to petitioner's instructional-error claim, the court of appeals first noted that, because petitioner had failed to object to the jury instructions at trial, his claim was reviewable only for plain error. Pet. App. 2a n.1. The court of appeals then rejected petitioner's contention that the district court had committed reversible plain error by failing to provide a definition for the statutory phrase "corruptly persuades." *Id.* at 12a. The court of appeals reasoned that, even assuming that the failure to define "corruptly persuades" was er-

roneous, "there is no evidence that this error had a prejudicial [e]ffect on the jury's deliberations so as to produce a miscarriage of justice." *Id.* at 12a-13a. The court noted that "[petitioner] does not contend that there is insufficient evidence that his conduct constituted corrupt persuasion within the meaning of the statute," and added that "[t]he evidence is sufficient that [petitioner] instructed Burnette to lie to cover up the incident." *Id.* at 13a.

The court of appeals also rejected petitioner's contention that the district court had erred by "improperly explain[ing] the extent to which federal involvement must be present." Pet. App. 12a. The court of appeals concluded that the district court's instructions on that issue were not erroneous because they "comport[ed] with the instructions approved by this Court in *Stansfield*." *Id.* at 13a.

ARGUMENT

Petitioner contends that the court of appeals erred by concluding that the government presented sufficient evidence that petitioner believed that the person he persuaded (or attempted to persuade) might communicate with federal authorities (Pet. 10-19) and that the district court did not commit reversible plain error in instructing the jury on the elements of the offense (Pet. 19-26). The court of appeals' decision does not conflict with any decision of this Court and implicates no conflict among the courts of appeals. Further review is therefore unwarranted.

1. As is relevant here, the provision at issue in this case, 18 U.S.C. 1512(b)(3), imposes criminal sanctions on any person who "knowingly * * * corruptly persuades another person, or attempts to do so, * * * with intent

to * * * hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." Another subsection of the same statute, 18 U.S.C. 1512(g)(2) (Supp. II 2002), provides that, in a prosecution under Section 1512(b)(3), "no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government."

Consistent with the language of those provisions, the courts of appeals have repeatedly held that, in a prosecution under Section 1512(b)(3), the government need not prove that the defendant believed that the person he persuaded *would* communicate with federal authorities (or that the defendant *knew* that a federal investigation was ongoing or that the offense at issue was federal). See, *e.g.*, *United States* v. *Byrne*, 435 F.3d 16, 25 (1st Cir. 2006); *United States* v. *Serrata*, 425 F.3d 886, 897-898 (10th Cir. 2005); *United States* v. *Perry*, 335 F.3d 316, 321-322 (4th Cir. 2003), cert. denied, 540 U.S. 1185 (2004); *United States* v. *Emery*, 186 F.3d 921, 925 (8th Cir. 1999), cert. denied, 528 U.S. 1130 (2000); *United States* v. *Diaz*, 176 F.3d 52, 90-91 (2d Cir.), cert. denied, 528 U.S. 875 and 957 (1999); *United States* v. *Veal*, 153 F.3d 1233, 1250 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999).

Petitioner contends (Pet. 15-16) that the court of appeals' decision conflicts with the decision in *United States* v. *Causey*, 185 F.3d 407 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000).[2] In *Causey*, the Fifth Circuit

---

[2] This Court denied certiorari when a similar claim was made in the petition filed in *Perry*, *supra*. See Br. in Opp. at 5-10, *Perry* v. *United*

invalidated convictions for witness tampering under 18 U.S.C. 1512(a)(1)(C), which contains a similar intent requirement to that in 18 U.S.C. 1512(b)(3). It is by no means clear, however, that the Fifth Circuit employed a different legal standard in *Causey* than the court of appeals did in this case. At the outset, the Fifth Circuit acknowledged that "there is no requirement that the Government prove that the defendants believed the law enforcement officials to be federal." 185 F.3d at 421. Instead, the Fifth Circuit reversed the convictions at issue because it found "no evidence in the record that would support an inference" that the defendants intended to prevent the victim from "pursuing her complaint beyond the New Orleans Police Department * * * and communicating with authorities who were in fact federal officers." *Id.* at 423. In reaching that conclusion, the Fifth Circuit relied on the Third Circuit's decision in *United States* v. *Bell*, 113 F.3d 1345 (Alito, J.), cert. denied, 522 U.S. 984 (1997), which (in turn relying on that court's earlier decision in *Stansfield*) had held that the fact that a defendant believed that the person he persuaded might communicate with federal authorities "may be inferred by the jury from the fact that the offense was federal in nature, plus appropriate evidence." *Causey*, 185 F.3d at 422 (quoting *Bell*, 113 F.3d at 1349).

Like the Fifth Circuit in *Causey*, the court of appeals in this case cited the standard from its earlier decisions in *Bell* and *Stansfield*. Pet. App. 5a-6a. Unlike the Fifth Circuit, however, the court concluded that the government had satisfied that standard, on the ground that there was "additional appropriate evidence" to suggest

---

States (No. 03-7262).

that the defendant believed that the person he attempted to persuade might communicate with federal authorities. *Id.* at 9a. Specifically, the court noted that petitioner was an experienced prison administrator and that, as a result, petitioner either knew or should have known both that the underlying offense was potentially a federal one and that federal officials were likely to become involved in the investigation. *Id.* at 10a-11a. On that basis, the court concluded that the jury could reasonably infer "that [petitioner] had actual knowledge of the federal nature of the offense or that Burnette's information might ultimately be communicated to officers who happen to be federal." *Id.* at 11a. To the extent that the Fifth Circuit in *Causey* applied the same "additional appropriate evidence" standard but merely reached a different result on the facts of that case, there is no circuit conflict that warrants this Court's review.[4]

Petitioner also contends (Pet. 17-19) that the court of appeals' "approach" in this case "differs" from that taken by this Court in *Arthur Andersen LLP* v. *United States*, 125 S. Ct. 2129 (2005). In *Arthur Andersen*, the Court reversed the conviction of an accounting firm for corruptly persuading persons with the intent to cause them to withhold documents from, or alter documents

---

[4] The court of appeals did suggest that, in its decision in *Applewhaite*, it had articulated a less stringent test than in its earlier decision in *Stansfield*. Pet. App. 7a. The court of appeals, however, ultimately concluded that the government had made the requisite showing under either test. *Id.* at 9a. To the extent that petitioner contends that the court of appeals' decision in this case nevertheless conflicts with *Applewhaite* and *Stansfield*, see, *e.g.*, Pet. 12 (asserting that "the court's decision is in direct conflict with its earlier decisions discussing this very subject"), that contention does not justify further review, because this Court does not sit to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B). The Court held, in part, that the jury instructions in that case were flawed because the jury was not required to find any nexus between the "corrupt persuasion" at issue and a particular "official proceeding." 125 S. Ct. at 2136-2137.

This case is readily distinguishable from *Arthur Andersen*, because the provision at issue in this case, 18 U.S.C. 1512(b)(3), does not require interference with an "official proceeding." Instead, Section 1512(b)(3) prohibits a person from corruptly persuading another person with the intent to interfere with the "communication to a [federal] law enforcement officer * * * of information relating to the commission or possible commission of a federal offense." In *Arthur Andersen*, there was no question that the "official proceeding" at issue was a *federal* one: *viz.*, an investigation by the Securities and Exchange Commission. See, *e.g.*, 125 S. Ct. at 2132. *Arthur Andersen* therefore does not bear on the question of what showing is required under Section 1512(b)(3) to demonstrate that a defendant believed that the person he persuaded might communicate with federal authorities.

At least one court of appeals has considered (and rejected) the same argument concerning *Arthur Andersen* that petitioner advances here. In *Byrne*, the defendant contended that *Arthur Andersen* required the First Circuit to "reassess" its earlier decisions holding, *inter alia*, that it was sufficient under Section 1512(b)(3) to demonstrate that "the possibility existed that [the witness's] communication would eventually occur with federal officials." 435 F.3d at 23 (quoting *United States* v. *Baldyga*, 233 F.3d 674, 680 (1st Cir. 2000), cert. denied, 534 U.S. 871 (2001)). The court reasoned that, in

light of the fact that Section 1512(g)(2) "explicitly disclaims" any requirement that the defendant know that the communication at issue would be made to a federal official, "[t]here is simply nothing in *Arthur Andersen* that helps the defendant." *Id.* at 25.[1] So too here, nothing in *Arthur Andersen* conflicts with the court of appeals' holding that the government presented sufficient evidence that petitioner believed that the person he persuaded might communicate with federal authorities.

2. At trial, the district court instructed the jury, without objection, that the government was required to prove, *inter alia*, that "the defendant attempted to corruptly persuade another person," C.A. App. 2260, and further instructed the jury that "[b]y its wording this statute does not depend on the existence or imminency of a federal case or investigation, but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime," *id.* at 2261.

Petitioner renews his contention (Pet. 19) that the district court erred by "fail[ing] to provide any definition of the words 'corruptly persuade'" and by "fail[ing] to properly instruct the jury regarding petitioner's state of mind concerning the federal nexus required under the statute." Because petitioner failed to object to the jury instructions, however, his claim is reviewable only for plain error.

Under *United States* v. *Olano*, 507 U.S. 725 (1993), when a defendant forfeits his claim in the trial court, relief under the plain-error rule is unavailable unless the

---

[1] In *Byrne*, the court also "express[ed] * * * doubts" as to whether "*Arthur Andersen* requires a heightened showing of a nexus in a § 1512(b)(3) prosecution[] between the intent to hinder communication and a particular law enforcement agency." 435 F.3d at 25.

defendant shows, *inter alia*, that the error affects his substantial rights and seriously affects the fairness, integrity, and public reputation of judicial proceedings. *Id.* at 734-737. The court of appeals correctly held that petitioner could not meet the *Olano* standard because he could not show prejudice (and thus an effect on his substantial rights) from the district court's failure to define "corruptly persuades" and because the district court's instructions concerning the "federal nexus" requirement were not erroneous. Pet. App. 12a-13a.

Petitioner contends (Pet. 20-26) that this Court's decision in *Arthur Andersen* suggests that the district court's instructions were invalid. That contention lacks merit. With regard to the failure to define "corruptly persuades," *Arthur Andersen* held, in part, that instructions that "diluted the meaning of 'corruptly' so that it covered innocent conduct" were invalid. 125 S. Ct. at 2136. *Arthur Andersen* did not hold that instructions that *failed* to define the phrase "corruptly persuades" were necessarily invalid—and even if it had, petitioner fails to demonstrate that he suffered prejudice from any instructional deficiency. There was ample evidence to prove that petitioner instructed Lieutenant Burnette to lie in order to cover up the beating. Pet. App. 13a. *Arthur Andersen* held that knowing corrupt persuasion requires "consciousness of wrongdoing." 125 S. Ct. at 2136. Intentionally ordering subordinates to lie in order to conceal an unjustified beating clearly reflects such consciousness.

With regard to the instructions concerning the "federal nexus" requirement, petitioner's argument fails for the same reason as his argument concerning the sufficiency of the evidence. *Arthur Andersen* held, in part, that the instructions at issue were invalid because the

jury was not required to find any nexus between the "corrupt persuasion" at issue and a particular "official proceeding," 125 S. Ct. at 2136; it did not speak to the question of what the government was required to show under Section 1512(b)(3) in order to establish that a defendant believed that the person he persuaded might communicate with *federal* authorities. In no respect, therefore, is the court of appeals' decision inconsistent with *Arthur Andersen*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
WAN J. KIM
Assistant Attorney General
DENNIS J. DIMSEY
CONOR B. DUGAN
Attorneys

MARCH 2006